



Current Public Sector Issues-Other Agencies and LAFCOs

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Overview

- Friend or Foe
- Indemnification
- Joint Defense Agreements
- Crafting Conditions
- Emerging Water Issues

LAFCO: Friend or Foe

- LAFCO Responsibility Over Agencies
 - Studies, MSRs, etc.
 - Review Applicant- and Agency-Initiated Proposals
 - Initiate Certain Proposals (Gov. Code, sec. 56375(a)(2).)
- Bottom-line: LAFCO can affect all local agencies (especially special districts)

LAFCO: Friend or Foe

- Best Practices
 - Educate first, especially smaller jurisdictions
 - Just because you can...
 - Absolutely a policy/political call but consider legal risks
 - Develop relationships
 - LAFCO as a resource

Indemnification

- Indemnification:
 - "a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." (Civ. Code, sec 2772.)
 - The California Supreme Court has noted that indemnity "may be defined as the obligation resting on one party to make good a loss or damage another party has incurred." (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628.)
 - Generally includes a duty to defend (Civ. Code, sec 2778; *Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541.)

Indemnification

- For LAFCOs, duty to defend is most important part
 - Damages generally not an issue; attorneys' fees and costs are the major loss (even if LAFCO wins)
 - Retain ability to select counsel
 - Retain ability to settle / control defense

Indemnification

- But LAFCO cannot require indemnification...
 - No express provision in CKH. Implied ability under Sections 56383, 56384(b).
- Ok, but my lawyer just has a couple of edits...
 - Recommend standard policy and language. Don't amend unless Legal Counsel reviews.
- I wasn't authorized to sign that...
 - Talk to Legal Counsel on who can sign (depends on entity). Include as condition of approval.

Joint Defense Agreements

- If LAFCO is sued (especially in CEQA), can/should you share information with affected agency and applicant?
 - Commonly done through a joint defense agreement
 - Intent is to avoid waiver of attorney-client privilege
 - Generally, only protects communications between client and attorney
 - Exception for some third party disclosures (common interest)

Joint Defense Agreements

- *California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217
 - County shared communications from its CEQA counsel with developer’s counsel. Petitioner sought disclosure of those communications.
 - County claimed the communications were privileged.
 - Court evaluated Evidence Code section 954, and found that privilege was not waived due to application of the common interest doctrine.

Joint Defense Agreements

- *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889
 - Prior to completion of CEQA process and project approval, City shared communications from its CEQA counsel with developer’s counsel. Petitioner sought disclosure of those communications.
 - City cited to *Tehama* decision and claimed that the communications were privileged.
 - Court found the common interest doctrine did not apply to communications, and any privilege under Evidence Code section 954 was waived.

Joint Defense Agreements

- Best Practices
 - Have Legal Counsel review your model agreement to see if it should be modified
 - Consult with Legal Counsel before disclosing any attorney-client communications (good rule in all cases)
 - Be aware of ambiguity in the law. Possible to restrict or reduce shared information?

Crafting Conditions

- LAFCO can “review and approve with or without amendment, wholly, partially, or conditionally, or disapprove proposals for changes of organization or reorganization.” (Gov. Code, sec 56375(a)(1).)
- BUT, LAFCO cannot “impose any conditions that would directly regulate land use density or intensity, property development, or subdivision requirements.” (Gov. Code, sec 56375(a)(6).)

Crafting Conditions

- How do you distinguish between permissible and impermissible conditions?
 - *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277
 - Court determined LAFCO could not regulate development on UC Santa Cruz campus.
 - BUT, it could condition water and sewer services on “low water condition” (i.e., supply ceiling)
 - LAFCO cannot specify form or manner of rezoning for annexations (Gov. Code, sec 56375(a)(7))

Crafting Conditions

- What happens if the local agency disagrees?
 - *Voices for Rural Living v. El Dorado Irrigation Dist.* (2012) 209 Cal.App.4th 1096
 - Agency must file a lawsuit. Court has exclusive ability to decide a condition is unconstitutional/impermissible.

Crafting Conditions

- Best Practices
 - No clear dividing line between impermissible “directly regulate” land use and permissible conditions that affect development
 - Stay away from zoning-type decisions
 - Ground conditions in service availability (even if it will indirectly affect development)

Emerging Water Issues for LAFCOs

- 2015 Update for Urban Water Management Plans
- Local Agency Drought Responses
 - Ability to provide services
- Groundwater Legislation
 - Rise of the JPAs?

Thank you for attending.

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